IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.884 OF 1997
IN
ARBITRATION PETITION NO.19 OF 1993
IN
AWARD NO.127 OF 1992

M/s.Chowgule Brothers
& Ors. ..Appellants
(Orig.Respdt.No.1)

Vs.

M/s.Rashtriya Chemicals
& Fertilizers Ltd. & Ors. ..Respondents.
(Orig.Petnr. & Orig.
Respt. Nos.2 to 4)

Dr.V.V.Tulzapurkar, Senior Advocate with Ms.Alpana Ghone i/b.M/s.Kanga & Co. for the Appellants.

Mr.Nitin Thakkar, Senior Advocate with Mr.S. John i/b.M/s.M.P.Savla & Co. for the Respondents.

CORAM: DR.S.RADHAKRISHNAN AND
S.J.VAZIFDAR, JJ.

DATED: 5TH APRIL, 2006

ORAL JUDGMENT : (Per S.J.Vazifdar, J.)

This is an Appeal against the order of the learned Single Judge allowing the Respondent's Petition under section 30 of the Arbitration Act, 1940 setting aside the majority award made by Respondent Nos.2 and 3.

2. Respondent Nos.2 and 3 awarded a sum of

Rs.61,73,067.90 and dismissed the counter claim of Respondent No.1. Respondent No.4, who made a minority award, dismissed the claim of the Appellant and the counter claim of Respondent No.1. Respondent No.4 dismissed the Appellant's claim only on the ground of limitation. Respondent No.4 did not consider the merits of the rival contentions regarding the maintainability of the claim for statutory increase in wages. Thus, in view of the majority award, the Appellant was entitled to the sum of Rs.61,73,067.90.

3. The learned Single Judge set aside the award on the ground that the same was contrary to a term of the contract and on the ground that the claims were barred by limitation.

4. Pursuant to the tender submitted by the Appellant, Respondent No.1 issued a work order dated 10.1.1983. The contract involved clearing, forwarding and handling jobs of bulk bagged fertilizers to be imported by Respondent No.1 at Mormugao Port. The contract was initially for the period 15.1.1983 to 14.1.1984. Respondent No.1 in exercise of the option conferred upon it, extended the same for the period 15.1.1984 to 14.1.1985.

Clause 32 of the terms and conditions of contract pertaining to arbitration reads as under :

> "32. SETTLEMENT OF DISPUTES - All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties".

Clauses 2.01 and 2.03 of the contract which falls for consideration reads as under :

> "2.01 Period of contract is one year from the date of award of work. 15.1.83/14.1.84"
>
> 2.03 It is hereby agreed that if the Company gives one month's notice to extend the Contract for a further period of one year from the expiry or the period mentioned in Clause 2.01, the Contractor shall be bound to continue to do the work and render services on the same terms and conditions, as contained herein, during such extended period, except for the statutory increase in the wages of Dock Labour allowed by the Mortgagor Dock Labour Board, for which documentary evidence shall have to be furnished by the Contractor. The manner in which such

statutory increase in the wages of Dock Labour will be allowed for the extended period of one year, if any, is indicated below;

Example showing method of calculating escalation for extended period of one year, in case of statutory increase in wages of Dock Labour allowed by the MDLB:

		First year of Contract	2nd year of Contract
1.	Wages per gang (for 3 gangs) 1st year Rs.695.91 x 3 2nd year Rs.889.72 x 3	Rs. 2087.73	Rs. 2669.16
2.	Night Weightage	Rs. 47.70	Rs. 47.70
3.	Winch set	Rs. 498.70	Rs. 633.33
4.	Night Weightage	Rs. 11.76	Rs. 11.76
	Charges for 3 gangs (out of 210 MTs.)	Rs. 2645.26	Rs. 3350.35
	Charges per MT.	Rs. 12.59	Rs. 15.95

Increase in wages of labour for 2nd year per MT. Rs.15.95 - Rs.12.59=Rs. 3.36 + (Y) Assuming the quoted rate for the work in 1st year is ('X') and the escalation works out to ('Y') for the 2nd year, the revised rate for the 2nd year, if the Contract is extended, will be Y - X.

NOTE : The rates, indicated against first and second year above, have been taken from MDLB's circulars from time to time. But the rates at which the Contract is initially

> awarded shall remain firm through out the period of one year from the date of award and shall not be subject to any escalation whatsoever. Similarly the rates allowed for the extended period of the year, if any, after considering the statutory increase, if any, in the wages of Dock Labour will also remain firm through out the extended period of one year and shall not be subject to any escalation whatsoever, even irrespective any subsequent increase in the wages of Dock Labour allowed retrospectively by the Mormugaon Dock Labour Board." (Emphasis provided)"

5. It is clause 2.03 which fell for the consideration of the learned Single Judge. The learned Judge held that the clause was capable of only one interpretation which barred the first Respondent’s claim for statutory increase in wages of the dock labour. We will deal with the question of construction after completing the narration of the facts.

6. In exercise of their right under clause 2.03, Respondent No.1 by a letter dated 13.10.1983 extended the contract for one year for the period 15.1.1984 to 14.1.1985 on the same rates, terms and conditions. The other contractual stipulations remained the same.

By a letter dated 7.12.1983 Respondent No.1

confirmed the extension and stated that there were a lot of statutory revisions in the wages of dock workers of the Mormugao Dock Labour Board (hereinafter referred to as "MDLB") during the previous year and that Respondent No.1 would have to consider the same while extending the contractual period.

Respondent No.1 by a letter dated 27.1.1984 referred to clause 2.03 and stated that the increase allowed by MDLB upto 15.1.1984 only would be considered for the purpose of quantifying the amounts due on account of escalation and not any increases in wages which were under negotiation and, in respect of which MDLB Circulars would be issued after 15.1.1984 with retrospective effect.

7. During the extended period MDLB by a circular dated 6.6.1984 (Exhibit "G" to the petition) stated that the dock workers should be paid wages according to the terms of a settlement dated 11.4.1984 by their respective employers with retrospective effect from 1.1.1984. The minimum rate payable to such workers was specified therein.

8. The Appellant admittedly discharged its

contractual obligations during the original as well as the extended period of the contract.

9. By a letter dated 11.6.1985, the Appellant stated some of the above facts and contended that Respondent No.1 was bound and liable to pay the wage increase as per the wage scales fixed for the extended period. The Appellant accordingly called upon Respondent No.1 to pay an amount of Rs.31,87,437.95, less an amount of Rs.4,23,312.11 being the amount already paid to the Appellant on account of increase in wages for the extended period. Respondent No.1 however, by a letter dated 21.8.1985 disputed the Appellant's entitlement to the same. We will deal with the contentions raised by the parties in the correspondence while considering the submissions of counsel.

10. Ultimately, the Appellant by a letter dated 28.10.1987 informed Respondent No.1 that they were going ahead in appointing an arbitrator in accordance with the arbitration clause and called upon Respondent No.1 to do the same. In response to the said letter, Respondent No.1 by their letter dated 19.11.1987 suggested that the parties should discuss the matter further before appointing the arbitrators.

11. We will set out the facts regarding invocation of the arbitration clause with the Indian Council of Arbitration, while dealing with the question of limitation.

12. Before going further, it is necessary only to mention that, in addition to the claim on account of statutory increases during the extended period, the Appellant also claimed certain other amounts. The majority arbitrators however awarded a consolidated amount. If the award is to be set aside, it must be set aside as a whole as it is not possible to ascertain in respect of which of the claims the amounts had been awarded and considering the amount awarded it is clear that a part thereof atleast was in respect of the claim for increase in statutory wages.

13. Mr.N.G.Thakkar, the learned Senior Counsel contended on behalf of Respondent No.1 that the majority arbitrators have made a speaking award. The Court, he submitted, is therefore entitled to read and construe clause 2.03 to decide whether the Appellant’s claim is barred thereunder. As far as the question of construction of clause 2.03 is

concerned, it is not necessary to decide whether the majority award is a speaking award or a non-speaking award. We permitted the parties to read clause 2.03 and construed the clause ourselves. This is necessary as the first ground of challenge to the award is that clause 2.03 is capable of only one interpretation and based on that interpretation, the Appellant's claim for escalation of rates consequent upon statutory increase in the wages of M.D.L.B. workers during the extended period from 15.1.1984 to 14.1.1985 is barred. If clause 2.03 is capable only of the interpretation placed upon it by Mr.Thakkar and accepted by the learned Judge, the majority award would have to be set aside on the ground that the arbitrators would then have to be held to have travelled outside the boundaries of the contract and acted without jurisdiction in awarding the said claim. In determining whether the arbitrators have travelled beyond their jurisdiction it would be necessary to consider the agreement which is their mandate. (see *Continental Construction Co. Ltd. v. State of Madhya Pradesh, AIR 1988 SC 1166*, *Associated Engineering Co. v. Government of Andhra Pradesh and another, AIR 1992 SC 232* and *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering, AIR 1999 SC, 3627)*.

14. Two inter-related questions fall for consideration. Firstly, what is the correct interpretation of clause 2.03. Secondly, assuming the construction suggested by Mr.Thakkar and accepted by the learned Judge is correct, whether the interpretations suggested by Mr.Tulzapurkar are possible or plausible. In other words, whether clause 2.03 is capable of being interpreted only in the manner contended by Respondent No.1 and is incapable of being construed in the manner contended by the Appellant.

15. In our opinion, the interpretation placed on the clause by Mr.Tulzapurkar is not only correct but is the only possible one. In fact, we even prefer the alternative interpretation of the clause suggested by Mr.Tulzapurkar to the one suggested by Mr.Thakkar and accepted by the learned Judge. In view of the learned Judges' interpretation, we spent considerable time analysing clause 2.03 with the assistance of both the counsel. With respect, we are unable to read the clause in the manner in which the larned Judge did and, Mr.Thakkar invites us to do.

16. As we shall demonstrate, to accept Mr.Thakkar's

interpretation would render most of clause 2.03 meaningless. Further, the least that must be said is that Mr.Tulzapurkar's interpretations are in any event plausible and cannot by any process of reasoning be termed irrational or absurd. In that event, the Arbitrators' interpretation being a possible one, the award would not be liable to be set aside though the Court may not consider it to be the correct one.

17. It would be convenient to summarise the relevant facts relevant to the interpretation of clause 2.03.

The original contractual period was from 15.1.1983 till 14.1.1984. The extended contractual period was from 15.1.1984 to 14.1.1985. On 31.12.1983 there was a Wage Agreement between M.D.L.B. and the Dock workers. In 1984 negotiations took place between M.D.L.B. and the Dock workers pursuant to which a fresh settlement was arrived at on 6.6.1984. The fresh settlement was given retrospective effect from 1.1.1984.

18. Mr.Thakkar submitted that in view of the last sentence in clause 2.03, the Appellant was not entitled to an increase in wages on account of a

fresh settlement after 15.1.1984 which was given retrospective effect.

19. At the outset we must mention that the matter was argued both before the learned single Judge and before us on the basis that the amount claimed by Respondent No.1 was on account of statutory increase in the wages of dock labour and not on account of any other increase in wages of the dock labour.

20. The example given in clause 2.03 to illustrate the method of calculating escalation for the extended period of one year, in case of statutory increase in wages of dock labour allowed by the M.D.L.B. really concludes the matter in favour of Mr.Tulzapurkar's interpretation. Various components of statutory dues are mentioned in two separate columns one pertaining to the "First year of Contract" and other pertaining to the "2nd year of Contract". There is a total at the foot of each column - Rs.12.59 in respect of the first year of the contract and Rs.15.95 in respect of the second year of the contract. The clause then goes on to compute the difference between the first year and the second year. The example concludes by clarifying what is quite obvious, viz. that the revised rate would be the difference between the

rates of the first year and the second year.

The clause does not specify any particular time when the statutory dues/increases of the dock labour for the second year of the contract is to be taken into consideration. This clearly establishes that whatever may be the statutory dues for the second year must be the amounts to be taken into consideration while computing the statutory increases without reference to the point of time when such increases were permitted or sanctioned. The example in clause 2.03 militates against Mr.Thakkar's constructions thereof.

21. If Mr.Thakkar's contention viz. that the dues for the second year must be only those fixed on the date of the commencement of the second year of the contract commenced i.e. 15.1.1984 is correct, all that was necessary was a simple statement to that effect in clause 2.03. There would have been no necessity of furnishing the example and a rather involved clause.

22. The heading of the second column in the example in clause 2.03 reads "2nd year of contract". To accept Mr.Thakkar's submission would require

rewriting the heading of the second column to read : "Rates at the commencement of the 2nd year of contract". This would involve rewriting the clause contrary to the plain meaning thereof. This approach is totally impermissible.

23. The aforesaid conclusion makes the last sentence in clause 2.03 not only intelligible but perfectly clear. To our mind, it is perfectly clear that the last sentence in clause 2.03, disentitled Respondent No.1 to increases in wages which may be allowed by MDLB and not to statutory increases in such wages. The sentence nowhere disentitles in any manner the Appellant to statutory increases applicable during the second year of the contract. The last sentence even read in isolation, pertains to increases other than statutory increases in wages. The error in Mr.Thakkar’s submission arises on account of equating statutory increases in wages with increase in wages for other reasons and in other circumstances such as by negotiation and agreement. The plain language of the last sentence indicates this distinction inasmuch as it contains the words "..... after considering the statutory increase, if any, ...". It is not without significance that these words are absent in the previous sentence which pertains to the first

year of the contract. The embargo upon the Appellant being entitled to any increases for the second year, is in respect of the increases other than the statutory increases. This is the only logical explanation for the plain language of the clause.

24. This is further clear from the word "allowed". The word "allowed" indicates increases which may have been arrived at by M.D.L.B. either on its own or pursuant to negotiations with the dock labour. In the case of a statutory increase, there would be no question of M.D.L.B. "allowing" the same. It would be a statutory entitlement.

25. To sum up therefore, the true interpretation of clause 2.03 is that the Appellant is entitled to statutory increases in the wages of the dock labour during the second year of the contract irrespective of when they were finalised/decided. In other words, the Appellants entitlement to such statutory increases is not limited to those obtaining on 15.1.1984 i.e. at the commencement of the second year.

26. This interpretation to our mind is the correct interpretation. As suggested by Mr.Tulzapurkar,

there may be yet another way of reading clause 2.03. Even if the clause is so read, the Appellant would be entitled to the claims awarded for statutory increase in the wages of dock labour for the second year of the contract.

27. To appreciate this alternative interpretation, it is necessary to note that it is nobody's case that there was a statutory increase for the second year which was decided on or before 15.1.1984 i.e. the date of commencement of the second year and that there was thereafter a further statutory increase for the second year itself. Therefore this is not a case where the Appellant was claiming not merely an initial statutory increase but also a further statutory increase pertaining to the extended period. Of course, on the first interpretation placed on clause 2.03 by us, the Appellant would be entitled to the same. However, even assuming that this was not so, the least that must be said in favour of the Appellant is that they cannot be denied the first statutory increase that may have been arrived at for the extended period and that all that they may have been disentitled to is any, to use the words in the last sentence of clause 2.03, "subsequent increase". Thus even on this interpretation, the award cannot be

set aside.

28. The error, if we may say with great respect, in Mr.Thakkar's submission, which was accepted by the learned Judge, arises on two counts. Firstly, the submission fails to read the clause and even the "NOTE" therein as a whole. Secondly, it fails to note the distinction in the language used in the first and the second sentences of the "NOTE" in clause 2.03.

29. Even assuming that the interpretations placed on clause 2.03 by Mr.Tulzapurkar are wrong, we have little, if any, hesitation in concluding that they are, to say the least, possible interpretations. If that be so, it is settled law that the Court will not substitute its interpretation for that of the arbitrators even if the Court thought it not to be the correct view.

30. In U.P.Hotels v. U.P.State Electricity Board (1989) 1 *SCC, 359,* the Umpire at length construed the provisions of section 49 of the Electricity (Supply) Act, 1948, in the light of the judgment of the Supreme Court in the *Indian Aluminium Companies* case in *Indian Aluminium Co. Ltd. v. Kerala State*

Electricity Board, (1975) 2 SCC, 414. The Supreme Court rejected the challenge to the award in the following manner :

> "27. In the instant case, the view taken by the Umpire on the interpretation of the agreement between the parties in the light of the observations of this Court in *Indian Aluminium Co.* case was at best a possible view to take, if not the correct view. If that was the position then such a view, even if wrong, cannot be corrected by this Court on the basis of long line of decisions of this Court. In the aforesaid view of the matter it is necessary to examine the aforesaid decision in the *Indian Aluminium Co.* case.
> .....
> .....
> The Umpire was right. In our opinion, the Umpire committed no error in arriving at such conclusion. Furthermore, such a conclusion is certainly a possible view of the interpretation of the decision of this Court in *Indian Aluminium Co.* case, if not the only view. We need go no further than that."
>
> "28. We are, therefore, of the opinion that the view taken by the Umpire on Section 49 was a possible view in the light of the decision of this Court in *Indian Aluminium* case. In the premises, a question of law arose certainly during the course of the proceedings. Such a question has been decided by the Umpire on a view which is a possible one to take. Even if there was no specific reference of a question

> of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award of the Umpire, and which is erroneous."

31. In *Sudarshan Trading Co. versus Government of Kerala, (1989) 2 SCC 38,* it was held as under :-

> "What is the interpretation of the contract is a matter for the arbitrator and on which the Court cannot substitute its own decision"

32. In *Hindustan Construction Company Ltd. versus State of J. & K., (1992) 4 SCC 217,* it was held as under :-

> "Even if in fact the arbitrators had interpreted the relevant clauses of the contract in making their award on the impugned items and even if the interpretation is erroneous, the court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract".

33. In *M/s.Hind Builders v. Union of India, (1990) 3 SCC, 338,* the Supreme Court held :

"11. ..... It is difficult to say, by merely reading the terms of contract that the arbitrators have erroneously interpreted the terms of the contract. It is not without significance that the departmental officers did not dispute the rate of the claim. Equally, the arbitrators were experienced engineers and would not have passed, what is now said to be, an astounding claim without thought. It is difficult to assume that all these persons have overlooked that the contractor had already been paid at Rs 18 under Item 4.09(a) especially when it is so stated on the face of the claim. This, therefore, is not a case where the arbitrators can be said to have ignored or overlooked a term of the contract; on the contrary, they have acted upon a particular interpretation of certain clauses of the contract on which two views are possible. This case certainly cannot be brought under the principle that the arbitrators have ex facie exceeded the authority or jurisdiction conferred on them by the contract. At worst, what can be said is that they may have committed an error in deciding the issue referred to them but the error is not apparent on the face of the award even if the contract is read as part of it both because the arbitrators have not given their reasoning and because the view taken by them of the relevant terms of the contract cannot be said to be clearly erroneous. In a matter on which the contract is open to two equally plausible interpretations, it is legitimate

> for the arbitrators to accept one or the other of the available interpretations and, even if the court may think that the other view is preferable, the court will not and should not interfere. This view is too well settled to need any reference to any precedent other than Sudershan Trading Co. case referred to earlier. That is why we think that this case does not fall within the principle referred to by Shri Banerjee and that Dr Ghosh is right in his submission that the Division Bench exceeded its jurisdiction in interfering with this part of the award."

It is pertinent to note that even in the case before us the Committee constituted by Respondent No.1 opined in favour of the Appellant's interpretation. Though, this by itself may not be conclusive of the matter, it is, in the words of the Supreme Court, "not without significance".

34. This brings us to the question of limitation.

Mr.Thakkar submitted that the claims were barred by limitation and the award was therefore liable to be set aside. In support of this submission, Mr.Thakkar relied upon some of the documents and pleadings mentioned in the recitals to the award and

the minority award. It appears that the Appellant had amended the statement of claim contending that even assuming that the claims were barred by limitation, the Appellant had made out a case of sufficient cause entitling it to the benefit of Section 5 of the Limitation Act. Mr.Thakkar relied extensively upon the reasoning contained in the minority award which rejected this case as also the Appellant's case that the recommendation of the Committee of Respondent No.1 in favour of the Appellant constitutes an acknowledgment of liability. Thus, referring only to the case in the amended statement of claim under section 5 of the Limitation Act and, relying upon the finding of the minority award, he submitted that from the face of the awards, meaning thereby the majority and minority awards, it was clear that the claim was barred by limitation. The learned Judge accepted this approach and set aside the award on the ground that the claims were barred by limitation. We are, with respect, unable to agree with either the finding or the approach adopted by the learned Judge.

35. It is important to note firstly, that the learned Judge has himself observed that the arbitrators have not stated how the documents

referred to in the recitals save the bar of limitation. We agree. Secondly, it is important to note that even the recitals do not state that the arbitrators have only taken into consideration the documents listed in the award. This is clear from the fact that each of the recitals clearly states that the arbitrators have considered all the relevant papers and documentary evidence "including inter-alia" the documents and the records listed by the arbitrators. Nor does the award suggest that the arbitrators decided the question of limitation only on the basis of the documents which they have enumerated. Added to this is the fact that there is nothing which suggests that the arbitrators had not construed the provisions of law relating to limitation. They have in the last recital stated that they have considered all the questions of fact and law and mixed questions of law and facts raised by the parties. Further, and this is important, there is nothing that suggests that the Arbitrators considered only the case under section 5 of the Limitation Act, introduced by the amendment to the statement of claim.

36. The majority award contains no reasons regarding the question of limitation. There is no basis

therefore to challenge the award of the arbitrators on the ground of limitation. Mr.Thakkar however submitted that the arbitrators had furnished reasons regarding the question of limitation and that the reasons were those contained in the "extracts from various documents". Firstly, we are unable to agree that mere extracts from the documents without even a comment in respect thereof, constitutes reasons. In fact, the learned Judge himself observed that the arbitrators have not stated how the documents referred to in the recitals save the bar of limitation. At the highest, it could be said that the documents could be looked at by the Court. There is not a sentence in the entire award which even remotely discloses a process of reasoning by the arbitrators, regarding the question of limitation.

37. The majority award does state that the same is for the reasons at Annexure ‘A’ thereto. Annexure ‘A’ (which we shall, for convenience, refer to as the award) starts with the word "REASONINGS". Immediately below this word are the words "AWARD RECITALS". Indeed what follows are only recitals each commencing with the words "AND WHEREAS" up to actual award which is prefixed by the word "AWARD", centred and underlined. Till then all that the award

consists of are a series of recitals. The recitals refer to the facts prior to the arbitrators entering upon the reference including the appointment of the arbitrators. Some of the recitals merely state that the arbitrators had considered all the relevant papers. Below these recitals, the arbitrators have set out the documents considered by them without commenting on any of the documents. The next recital states that the arbitrators had taken into consideration all the documentary evidence. Below these recitals, they have merely set out clause 2.03 without making any comment in regard thereto and various other documents merely by quoting some of the contents thereof again without any comment in respect thereof. In sub-para (e) of this recital, the arbitrators have stated in some detailed the recommendations of a Committee appointed by Respondent No.1 to consider the Appellant's claim. The arbitrators have set out the recommendations of the Committee which are in favour of the Appellant. The next recital states that the arbitrators have considered the oral evidence and that they had the benefit of discussing the matter with Respondent No.4, who has given the minority award. The last recital reads as under :-

> "AND WHEREAS we have given our careful consideration to all questions of the fact and law and mixed questions of law and fact raised by the parties including the question of limitation, we do hereby make our Award in the Claim and Counter-claim as set out hereinbelow :-"

Immediately thereafter follows the word "AWARD" under which is the award in favour of the Appellant in the sum of Rs.61,73,067=90, the dismissal of the counter-claim and an order that the parties would bear their own costs. Here again there are no reasons.

38. In *Jajodia (Overseas) (P) Ltd. v. Industrial Development Corporation of Orissa Ltd., (1993) 2 SCC, 106,* the Supreme Court held :

> "8. It is, we think, necessary first, to clear some cobwebs. A speaking or reasoned award is one which discusses or sets out the reasons which led the arbitrator to make the award. Setting out the conclusions upon the questions or issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions does not make an award a reasoned or speaking award. The arbitrator has in the award before us only answered the issues that were framed. He has not discussed or set o t the reasons for the answers. The award is, therefore, not a speaking or reasoned award."

39. There is not a word in the majority award which

indicates any process of reasoning on the part of the arbitrators for having made the award. No doubt there are several recitals but not one of them contains any statement which constitutes reasons for the award. They merely referred to the contents of the documents. If reasons were mandatory the award would have had to be set aside on the ground that no reasons had been furnished. Mr.Thakkar was unable to indicate a single sentence in the majority award which could be said to be or even be said to disclose the thought process of the Arbitrators.

40. Mr.Thakkar's reliance upon the case of *J & K Handicrafts v. Good Luck Carpets (1990) 4 SCC, 740*, in this regard is not well founded. One of the points raised there was whether the Arbitrator had allowed claims which were neither contemplated by the incentive scheme nor by the agreement whereunder the reference was made. It was contended on behalf of the Respondent that the agreement could not be looked into even to find out the nature of the dispute. It was further contended that this was more so as the award was a non-speaking one. It was with regard to the question whether the contract could be looked into while considering the arbitrator's jurisdiction that the Supreme Court held that the award was not a

totally non-speaking one inasmuch as it gave a resume of the scheme and the agreement. It is important to note that having so held, the Supreme Court added, "Of course, while fixing the amount found payable by the appellant, no reasons are recorded." The Supreme Court further held that to decide such a point it would in any event be necessary to see the agreement.

The judgment is of no assistance to Respondent No.1.

41. It is not possible to decipher any reasons adopted by the arbitrators for award. Mr.Thakkar, the learned Senior Counsel appearing on behalf of Respondent No.1 was unable to indicate anything in the majority award which could be said to indicate reasons for the same. Thus, even if we were to accept Mr.Thakkar's submission that the extracts of the documents in the award constitute reasons, there is no proposition of law which can be said to be the basis of the award and is erroneous. There can therefore be no question of there being any error apparent on the face of the award. (See *Steel Furniture v. Union of India AIR 1967 SC, 378* - paragraphs 9 and 10). In *N. Chellappan v. Secretary, Kerala State Electricity Board And Anr., (1975) 1 SCC, 289*, the Supreme Court

held :

> "12. ..... In the award, the umpire has referred to the claims under this head and the arguments of the Board for disallowing the claim and then awarded the amount without expressly adverting to or deciding the question of limitation. From the findings of the umpire under this head it is not seen that these claims were barred by limitation. No mistake of law appears on the face of the award. The umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law o of fact, that is no ground for challenging the validity of the award. It is only when a proposition of law is stated in the award and which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error, of law apparent on the face of the record: "Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside. The general rule is that, as the parties choose their own arbitrator to be the Judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts." (See Russell on Arbitration, 17 h Edn., p. 322.)" 13. An error of law on the face of the award means that you can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition

> which is the basis of the award and which you can then say is erroneous (see Lord Dunedin in Champsey Ehara & Co. v. Jivraj Baloo Co.2). In Union of India v. Bungo Steel Furniture Pvt. Ltd.3 this Court adopted the proposition laid down by the Privy Council and applied it. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law."

42. Mr.Thakkar submitted that the Appellant's case in the amendment to the Statement of Claim seeking relief based on section 5 of the Limitation Act is not well founded and that the minority award based on this aspect is correct. We will presume he is correct. There is yet an apparent fallacy in the submission that the award is for this reason liable to be set aside. This is because the submission is based on the erroneous presumption that the question of limitation was to be decided only on the basis of the Appellant's case under section 5 of the Limitation Act.

43. The award of the majority does not justify the presumption. As we have already demonstrated, the majority award does not contain any reasons regarding the question of limitation. There is nothing in the majority award that suggests that the arbitrators

considered the question of limitation only on the basis of the Appellants' case in the amendment to the Statement of Claim. The mere fact that the Appellant pleaded the saving of the bar of limitation, is not conclusive of the matter. It is always open for a party to contend that the claim is not barred by limitation and, in the alternative, to contend that the bar of limitation, if any, is saved on any count.

44. In fact, the claims were not barred by limitation. Moreover, even if we were to adopt the learned Judge's approach viz. to refer to the documents extracted in the recitals in the award, it would lead to the conclusion that the claims are not barred by limitation. It is not even as if the claims were barred by limitation but, that the bar were saved on account of any of the provisions of the Limitation Act.

45. Before we proceed to demonstrate how the claims were not barred by limitation, we wish to clarify that we do so, not with a view to suggest that it is incumbent upon the Appellant to establish the same but, with a view to illustrate that in a non-speaking award, there may be various reasons for the arbitrators to come to a conclusion of law or fact.

We also do so to illustrate the dangers in relying upon a minority award, while considering a petition for setting aside an award.

46. The renewed contract expired on 15.1.1985. The period of limitation for a suit would have expired on 15.1.1985. On 28.10.1987, the Appellant wrote to Respondent No.1, stating that they were appointing their arbitrator and called upon Respondent No.1 to do the same. Section 37(1) and 37(3) of the Arbitration Act, 1940, read as under :

> "**37. Limitation.-** (1) All the provisions of the Indian Limitation Act, 1908 shall apply to arbitrations as they apply to proceedings in Court.
>
> (2) .....
>
> (3) For the purposes of this section and of the Indian Limitation Act, 1908 an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated."

47. In view of the provisions of section 37(3), time stopped running for the purpose of limitation by the

letter dated 28.10.1987. By this letter, the Appellant expressly stated that they were going ahead in appointing an arbitrator and, requested Respondent No.1 to do the same so that the arbitration proceedings could be commenced. The said letter constitutes a notice requiring appointment of an arbitrator within the meaning of section 37(3).

48. Mr.Thakkar did not and could not dispute the fact that the letter dated 28.10.1987 does constitute a notice requiring appointment of an arbitrator under section 37(3).

49. He, however, sought to overcome this difficulty in two ways. Firstly, he submitted that this is not the basis on which the majority award was made.

50. The award, as we have already held, is a non-speaking award. It is not open to the Court in an application, for setting aside the award to enter into the relm of conjuncture to ascertain the basis on which the arbitrators may or may not have decided an issue. The award, in any event, does not state or even suggest that the arbitrators came to the conclusion that the claim was barred by limitation but that on the basis of the amended statement of

claim, the bar was saved.

51. Further, and far more important is the fact that even if we were to accept Mr.Thakkar's submission that extracts from documents by themselves constitute reasons, his arguments omits to consider the fact that one of the recitals not merely refers to the letter dated 28.10.1987 but sets it out in extenso. Added to this, is the fact that the letter dated 28.10.1987 was Exhibit "24" to the statement of claim itself. To accept Mr.Thakkar's contention would be to presume that the majority arbitrators did not consider the legal effect under section 37(3) of the letter dated 28.10.1987. The presumption is without any basis, unwarranted and would be unfair to the learned arbitrators.

52. Further, merely because the minority award does not refer to provisions of section 37(3) of the Arbitration Act, it does not follow that the majority arbitrators also did not consider the same.

53. Mr.Thakkar submitted that section 37(3) was not argued before the learned arbitrators. This is a dangerous ground to entertain while considering a challenge to an award. It is not open to us to draw

an inference on the basis of circumstances extraneous to the award, as to what was argued or not argued before the arbitrators. For instance, though this point was argued before us and Respondent No.1 has dealt with it in its written submission, the Appellants themselves have omitted to mention the same in their written submissions. Similarly, there are other aspects which though discussed in Court, do not find place in the written submissions. Nor is it open to us to presume that the arbitrators did not consider any particular evidence or any legal provisions while arriving at their conclusions. It may be a different matter where the question is whether a case was pleaded at all. This may entitle the Court to read the record before the arbitrators. We are not concerned with such a case here. While it is necessary to plead facts and circumstances which save the bar of limitation, it is not necessary to plead that the claim is not barred by limitation if the facts pleaded show the same. As stated above, the letter dated 28.10.1987 was referred to in and annexed as Exhibit 24 to the statement of claim and was set out in extenso in the majority award. Even assuming that the point was not argued before the learned Single Judge, that by itself would not indicate that the Arbitrators had not taken the

aspect into consideration.

54. Faced with this, Mr.Thakkar submitted that in the facts of this case, section 37(3) has no application. He submitted that the arbitration was to be in accordance with the rules of arbitration of the Indian Council of Arbitration. Rule 7 provides that where parties have agreed for arbitration by the ICA, the same or any amendment thereon, shall apply. Rule 16 provides that any party wishing to commence arbitration proceedings under the rules, shall submit to the Registrar of the ICA, a written request for arbitration, which shall include or be accompanied inter-alia, by the details of the parties, the statement of claim and the arbitration agreement. Rule 22 which deals with the constitution of the bench, provides that on receipt of an application, the Registrar of the ICA shall take necessary steps to have the bench constituted for adjudication of the disputes. Rule 24 then provides for the manner in which the arbitration bench is to be constituted.

55. Mr.Thakkar submitted that section 37(3) must be read with section 8. So read, according to him, section 37(3) only envisages two types of situations as to when a notional date can be applied for an

arbitration. He submitted that in the present case, section 37(3) did not apply as the parties had agreed as to how the arbitration would commence and that there was no necessity for one party to serve any notice upon the other party, requiring the appointment of an arbitration. Thus, he submitted that section 37(3) has no application in a case, such as this, where parties have agreed to a procedure for the appointment of arbitrators. Lastly, he submitted that in this case, time stops running only when an application is made in accordance with Rule 16 of the Rules of the ICA. We are unable to agree with these submissions.

56. Mr.Thakkar's submission that section 37(3) of the Arbitration Act is of no relevance in view of the rules, in particular, Rule 16 of the ICA, is not well founded. The rules pertain to the procedure to be adopted by the parties for the conduct of the arbitration proceedings. They do not negate, impliedly or expressly, section 37(3) of the Arbitration Act. So long as the procedure prescribed under section 37(3) is followed, it cannot possible be contended that the claim is barred by limitation.

57. In addition, if the procedure prescribed under

Rule 16 of the ICA Rules had been followed, it may have been possible for a party to contend that the same in substance, conforms to the requisite notice under section 37(3). Thereby also, it may be open for a party to contend that time stopped running on the compliance with the provisions of Rule 16. With this additional mode we are not concerned presently. The rules relied upon by Mr.Thakkar, certainly do not curtail the effect or the applicability of section 37(3).

58(a). Mr.Thakkar's reliance upon the judgment of a three Judge Bench of the Calcutta High Court in *Motilal Chamaria v. Lal Chand Dugar, AIR 1960 Calcutta, 6*, is therefore of no assistance to him. Rule V(1) of the Bengal Chamber of Commerce and Industry, provided that disputes and differences were to be referred for the decision of the Chamber or the Tribunal, by an application addressed to the Registrar in the prescribed form. Sub-rule (2) thereof provided that on receipt of such application, the Registrar shall constitute a Court for the adjudication of the dispute. It was contended on behalf of the Petitioner that unless the provisions of section 37(3) were complied with, the claim would be barred by limitation. The situation therefore in

that case was converse to the one before us. The Full Bench rejected this contention and held that as soon as the Respondent complied with the provisions of Rule V, the arbitration commenced.

(b). Mr.Thakkar relied upon paragraphs 12 and 13 of the judgement which read as under :

> "(12) Sub-sec. (3) of sec. 37 cannot be construed as exhaustive of the circumstances under which an arbitration commences. The expression "shall be deemed to be commenced" indicates that the sub-section deals with two modes of notional or fictional commencement as distinguished from factual commencement. It is possible to conceive of cases where an arbitration can be said to have commenced under circumstances not contemplated by sub-sec. (3) of sec. 37 as, for example, when parties by an agreement in writing actually submit existing disputes to a particular arbitrator of their choice. In such a case no notice to appoint an arbitrator is necessary nor is, any notice requiring that the difference be submitted to a named Arbitrator, called for. So it is clear that the sub-section (3) was not intended to be exhaustive or to be a complete code by itself.
>
> (13) Therefore if, the parties have agreed that they will be bound by the rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce and the rules show that the initiation of the arbitration proceeding is to be made in a particular manner, there is no

> reason why the commencement of the arbitration cannot be made by adopting that course. It has been argued that some indication is also furnished by cl. (3) of the First Schedule to the Arbitration Act that an arbitration commences as soon as an arbitrator is called upon to act by notice in writing from any party to the arbitration agreement."

(c). The judgment is of no assistance to Respondent No.1. Though, the Full Bench held that section 37(3) cannot be held as exhaustive of the circumstances under which an arbitration commences, the Full Bench did not hold that in view of the said Rules, section 37(3) would be inapplicable or that a party is de-barred from making an application in the manner prescribed under section 37(3) for the purpose of limitation. The rules of the ICA relied upon by Mr.Thakkar, certainly do not prescribe expressly or impliedly, an exclusion of the provisions of section 37(3).

59(a). Mr.Thakkar's reliance upon the judgment of the Division Bench of the Madras High Court in *Penukonda Rathakrishnamurthy v. Balasubramania & Co. & Ors., AIR (36) 1949 Madras, 559* is for the same reason, of no assistance to him. Rule 5 of the Arbitration Bye-Laws of the Madras Yarn Merchants'

Association, provided that any party to a dispute shall apply in writing to the Secretary of the Association in the prescribed form and that such an application shall be accompanied by the plaint and the necessary documents. The Appellant followed this procedure. The Single Judge took the view that under section 37(3) of the Arbitration Act, the criterion date for limitation was the date on which the party was served with the notice through the Secretary. He therefore held the claim to be barred by the lapse of time.

(b). Mr.Thakkar relied upon the following observations of Rajamannar C.J. :

> "[13] Kunhi Raman J. held that the claim was clearly barred by limitation in view of the provisions of S. 37(3), Arbitration Act, 1940. In my opinion, that sub-section has no application whatsoever to this case. Obviously, it cannot apply to several arbitrations in which there would be no necessity for one party to the arbitration agreement serving on the other party any notice requiring the appointment of an arbitrator. Take, for instance, the case where there is a submission to arbitration duly signed by both the parties at the same time. It cannot be said in such a case that in spite of an agreed submission there should be service of notice by one party on the other. This position was conceded by Mr.Radhakrishnayya, the

> learned advocate for the respondent. Section 37(3) must, in my view, be read with the provisions of S. 8(1) which runs thus :
>
> "In any of the following cases : (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or (b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or (c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; and party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy."

(c). We are unable to read this judgment as obliterating section 37(3) merely because there is a rule which prescribes another method of invoking arbitration. It merely gives the parties another method of saving the bar of limitation.

60. Mr.Tulzapurkar submitted with considerable force that the approach adopted by the learned Judge by referring to the minority award was erroneous. We agree.

61. In our view, it is not permissible to look at the minority award while considering a petition to set aside a majority award for several reasons. Firstly, such an approach predicates that the majority arbitrators took into consideration only those facts and documents relied upon in the minority award. Such an approach also predicates that the majority arbitrators did not consider the question from any other angle. It also predicates that the majority arbitrators considered only the questions of law considered by the minority award. These presumptions would be incorrect. This would also be unfair to the majority arbitrators. Such an approach would, in fact, lead to tremendous confusion in the adjudication of petitions for setting aside arbitration awards. The majority award can only be set aside on the basis of what is stated therein and not on the basis of what is stated in the minority award. To hold otherwise would open up a pandoras box.

62. In *Fertilizer Corporation of India Ltd., New Delhi v. I.D.I. Management (U.S.A.) & Ors., AIR 1984 Delhi, 333*, the Division Bench held :

"**17.** The majority awards are non-speaking awards. In his separate dissenting note dated 16-2-1974 Mr.B. Sen has given his reasons for differing from the majority. The Corporation relies heavily on Mr.B. Sen's note in order to attack the majority awards. On behalf of the Corporation it is contended that the note of Mr. B. Sen dated 16-2-1974 is a minority award and it can be looked at for the purpose of finding the reasons of the majority awards.

18. The opinion of Mr. B. Sen formed the principal topic of discussion and was submitted as a ground for setting aside the majority awards. I cannot agree with this submission. The majority arbitrators refrained from giving reasons for their awards, which they had every right to do. The minority arbitrator, Mr. B. Sen, is a well known and reputed member of the legal profession. He gave reasons for his dissent. That he did so can only be attributed to an honest and understandable desire on his part to indicate to his colleagues where and how he differed from them; and of course to give those interested the same information. The reasons which he has given cannot be said to be reasons of the majority. Mr. B. Sen's reasons are minority reasons and as such form no part of the award.

19. The awards clearly state that they are the awards of the majority. Only Lord Devlin and Mr. J. Russell Wilson signed the awards. Mr. B. Sen did not sign. He was a dissenting member. In his dissenting note he disagrees with the view of the majority. But that is neither here nor there. The dissenting opinion of Mr. B. Sen simply shows, what everybody knows,

> that there are two sides to every question. Like the two sides of a coin. That there can be different and differing points of view on every conceivable question under the sun is all that the note of Mr. B. Sen shows. But no value can be attached in law to his dissenting opinion. The awards of the majority will prevail. (See Holland and Couser v. City of Vancouver, (1959) 1 DLR (ed) 404 (Canada) and Yarrows Ltd. v. C.N. Steamship Co. Ltd. (1951) 2 DLR 204 (Canada)).
>
> **20.** Section 10(2) of the Arbitration Act says that the opinion of the majority will prevail. The majority is a term signifying greater number. Section 10(2) is based on the theory of numbers. It requires counting of heads. If there are three arbitrators, two will have the deciding voice because they constitute the majority. The remaining one will be in a minority. The opinion of the minority cannot be looked at for any purpose. The award with which the law is concerned is the award of the majority."

We are in respectful agreement with the judgment of the Delhi High Court in this regard.

63. In the circumstances, we hold that the claims were in fact not barred by limitation. We further hold that there is no error on the face of the award or otherwise regarding the question of limitation.

64. Lastly, Mr.Thakkar submitted that the arbitrators had wrongfully awarded interest despite the fact that clause 5.01 of the contract provided that no interest shall be paid on outstanding bills. This point was not raised in the reply to the statement of claim. It was not raised before the learned Single Judge. It would be unfair to the Appellant to permit the point to be raised before us across the bar. The Appellant was not even put to notice that an objection regarding interest would be taken. This would be so even assuming that the clause is clear for there may well have been an answer to this argument on facts. If we permit Respondent No.1 to raise this point in this manner, it would deprive the Appellant an opportunity of meeting the same.

65. The Appeal is therefore allowed and the order and judgment of the learned Single Judge is set aside. In exercise of our discretion under Rule 87(5) of the Rules of the High Court of Judicature at Bombay (Original Side), we pass a judgment and decree in terms of the award.

At the request of Mr.Thakkar, the judgment and order is stayed for a period of eight weeks from

today.